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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-838

STATE OF MAINE

Petitioner

v.

JOLINE and LIONEL THIBOUTOT

Respondents

MOTION TO PROCEED IN FORMA PAUPERIS

Respondents Lionel and Joline Thiboutot, who are residents of Topsham, Maine, ask leave to file the attached Respondents' Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Respondents' Affidavit in support of this Motion is attached.

December 10, 1979

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ATTORNEYS FOR RESPONDENTS

IN THE

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Petitioner

v.

JOLINE and LIONEL THIBOUTOT
Respondents

AFFIDAVIT

We, Lionel Thiboutot and Joline Thiboutot, being first duly sworn do state as follows:

1. We are the Respondents in the above-captioned case.

2. We live in Topsham, Maine, with our six children in a house which we purchased for $29,000 in 1975. We believe that we have approximately $4,000 in equity in that house at present. We have no other assets other than household furniture and a 1971 Plymouth.

3. We have income from two sourses. We each receive AFDC grants totalling for both of us $285.00 per month. Mr. Thiboutot earns approximately $654.00 net pay every month.

4. Because of our poverty we are unable to pay the costs of this cause. Because of our poverty we are unable to give security for the same.

5. We believe that we are entitled to the relief we sought below for the grounds stated in the opinion of the Supreme Judicial Court of Maine.

December 13, 1979 — Joline Thiboutot
Joline Thiboutot

December 13, 1979 — Lionel Thiboutot
Lionel Thiboutot

STATE OF MAINE — December 13, 1979

COUNTY OF CUMBERLAND

Personally appeared before me the above-mentioned Joline Thiboutot and Lionel Thiboutot and made oath that the foregoing statements are true, and believed to be true where made on information and belief, according to his best knowledge, information and belief.

Ching Lee Trueheart
Notary Public
My Commission expires
1 Sept 85

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Respondents

RESPONDENTS' BRIEF IN OPPOSITION
TO THE PETITION OF THE STATE OF MAINE
FOR A WRIT OF CERTIORARI.

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December 1979

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RESPONDENTS' BRIEF IN OPPOSITION
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FOR A WRIT OF CERTIORARI.

QUESTIONS PRESENTED

Was the Maine Supreme Judicial Court in error when it interpreted 42 USC §1983 to provide a cause of action for a violation of the "laws" of the United States, to wit, 42 USC §602(a)(7), a portion of the Social Security Act Relating to Aid to Families with Dependent Children?

Was the Maine Supreme Judicial Court in error when it ruled that 42 USC §1988 authorized an award of attorney fees in an action in which the trial court ruled in favor of respondents but found no violation of respondents' constitutional rights?

STATEMENT OF THE CASE

Respondents believe that petitioner's statement of the case is accurate with one exception. There is no evidence in the record

to support petitioners' statement that they acted in good faith (because their good faith was never in issue) in reducing respondents' AFDC benefits. (Pet. 4).

STATUTES PRESENTED

Rev. Stat. §563. The district courts shall have jurisdiction as follows:

(14) Of all proceeding by the writ of quo warranto, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress, or of a State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States.

Rev. Stat. §629. The circuit courts shall have original jurisdiction as follows:

(14) Of all proceedings by the writ of quo warranto, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress or of a State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States.

M.R.Civ.P. 80B. REVIEW OF GOVERNMENTAL ACTION

(a) Mode of Review. When review by the Superior Court, whether by appeal or otherwise, of any action or failure or refusal to act by a governmental agency, including any department, board, commission, or officer, is provided by statute or is otherwise available by law, proceedings for such review shall, except as otherwise provided by statute, be governed by these Rules of Civil Procedure as modified by this rule....

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

The rulings of the Supreme Judicial Court that respondents had properly maintained an action under 42 USC §1983 and that 42 USC §1988 authorized an award of attorney fees will be discussed in turn.

A. The Ruling That Respondents Properly Asserted a Cause of Action Under 42 USC §1983 Setting Forth a Claim Under 42 USC §602(a)(7) Should Not Be Reviewed.

Petitioners argue that 42 USC §1983 does not mean what it says. Their position is that Chapman v. Houston W.R.O., ___U.S. ___, 99 S.Ct. 1905 (1979), held that only constitutional claims may be asserted under §1983 and thus the decision below is not in accord with applicable decisions of this Court. (Pet. 7-11). They are in error.

1. The question presented is not important enough to merit review.

Since the adoption of the Revised Statutes over one hundred years ago §1983 has protected citizens against deprivations of rights "secured by the Constitution and laws."(emphasis supplied). The statute was changed from its initial 1871 version which did not include the phrase " and laws".

Relying on the word "laws" respondents filed their §1983 action challenging petitioners' AFDC regulation as violative of 42 USC §602(a)(7) in the Maine Superior Court without asserting a constitutional claim.[1] Had this action been filed in the federal district court, 28 USC §1343(3) would have required respondents to assert a constitutional claim under §1983. Chapman, supra, so holds. And respondents' constitutional claim would have had to meet the test of Hagans v. Lavine, 415 U.S. 528 (1974).

1. Respondents joined a state law cause of action in the nature of common law certiorari under M.R.Civ.P. 80B. See the discussion in Carlson v. Oliver, 372 A.2d 226, 229 (Me. 1977).

But respondents chose to exercise an option which our federalism gives them: pursuing federal law claims in state court. Not needing a Hagans constitutional claim respondents did not make one, although they certainly could have. See Van Lare v. Hurley, 421 U.S. 338, 344 (1975).

Most all litigation in which a §1983 cause of action is asserted is brought in federal court; a constitutional claim is invariably presented or will be following Chapman. Therefore, the question presented here is one which will be exceedingly rare in the future. The petition should be denied for that reason.

2. The petition should be denied because the decision below is in accord with prior decisions of this Court.

The Maine Supreme Judicial Court recognized the division of opinion on this Court in Chapman as to the propriety of relying on the plain meaning of §1983 to allow the assertion of a purely statutory claim. However, it also recognized that in numerous cases before Chapman this Court had entertained statutorily based §1983 claims[2] and that a majority of the Justices discussing the question in Chapman had expressed themselves in favor of the respondents' position. Thiboutot v. State, 405 A.2d 230, 235-236 (Me. 1979); (Pet. A13-A14).

Two points not discussed in Chapman merit consideration. First, Congress had not one but two chances to correct errors in the Revised Statutes. Because the 1874 version was so inaccurate a second edition was proposed and enacted in 1878. No change was

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2. The cases are collected in Justice White's Opinion, 99 S.Ct. at 1937-1938.

made or even proposed in §1979 (the predecessor of 42 USC §1983) at either time. M. Price and H. Bitner, Effective Legal Research 29 (1969). If the addition of the phrase "and laws" to §1979 was error, it is indeed strange that no attempt was made to correct it in 1878.

Second, Justice Powell's concurrence finds that because of inability or oversight the revisers were unable to use identical language to express identical meaning in §563(12) and §629(16) of the Revised Statutes. To give those sections identical meaning the revisers' error is "corrected" by adding the words which appear only in §629(16) "providing for equal rights" to §563(12), thereby limiting the application of §563(12) to "any law providing for equal rights". §563(12) had initially applied to "any law". A similar "correction" is then made in Rev. Stat. §1979 (1878) and thus §1983 is interpreted as not allowing the assertion of purely statutory claims. 99 S.Ct. at 1924 and n.15.

However, where they intended identical meaning in those statutes, the revisers used identical words. Compare §563(14) with §629(14).[3] The Court below was correct in reading the word "laws" in §1983 to allow the assertion of purely statutory claims.

Nevertheless, if this question was not ripe for resolution in Chapman, respondents suggest that there has been insufficient time to allow further development in this area by lower courts and that it is still not ripe for resolution.[4]

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3. There is one typographical error in §563(14): "proceeding(s)" does not have an "s".

4. Two other courts have decided this question since Chapman and have resolved it in favor of respondents' position. Louise B. v. Coluatti, 606 F.2d 392, 398 (3rd Cir. 1979); Tongol v. Usery, 601 F.2d 1091, 1099-1100 (9th Cir. 1979).

B. The Ruling That 42 USC §1988 Authorizes an Award of Attorney Fees When There is No Finding of a Violation of Respondents' Constitutional Rights Should Not Be Reviewed.

As to the question that petitioners present, but do not seem to argue, the decision of the court below was in accord with the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 USC §1988). The history of the Act states that a finding of a constitutional violation is not necessary to support an award of fees in a §1983 action. S.Rep. 94-1011, 94th Cong., 2nd Sess. 4 (1976); H.R.Rep. 94-1558, 94th Cong., 2nd Sess. 7 n.4 (1976). Seals v. Quarterly County Court, 562 F.2d 390, 393-394 (6th Cir. 1977). This question does not raise an important question and the petition should be denied.

The petitioner argues that certiorari should be granted to consider this question because this Court granted certiorari to consider it in Maher v. Gagne, No. 78-1888, cert. granted, ____U.S. ____, 100 S.Ct. 44 (1979). (Pet. 11-12) Again they are in error.

The first question presented in Maher is whether a plaintiff in a case that is settled is a prevailing party within the meaning of 42 USC §1988. The instant case was litigated to a conclusion; it was not settled. 405 A.2d at 232. Maher was settled. Therefore the first question presented in Maher is not present in this case.

The second question presented in Maher is whether an award of fees against the state may be justified as "ancillary" in

the face of an Eleventh Amendment objection. This question was not raised by petitioners below nor was it decided by the Supreme Judicial Court.[5] Therefore it may not be raised here by petitioner. 28 USC §1257(3).[6]

Assuming that the question was properly raised by petitioner, the opinion below is in conformity with opinions of this Court. Hutto holds that an award of fees against a state is ancillary. 437 U.S. at 695-698. Also, the Eleventh Amendment has by its terms no applicability to state court actions. State sovereign immunity is unavailable in the face of a federal law claim. Ferri v. Ackerman, ____U.S.____, 48 U.S.L.W. 4054, 4055 (1979); see Testa v. Katt, 330 U.S. 386 (1947).

Thus, none of the questions presented in Maher are present in this case and even if present are so insubstantial that the petition should be denied.

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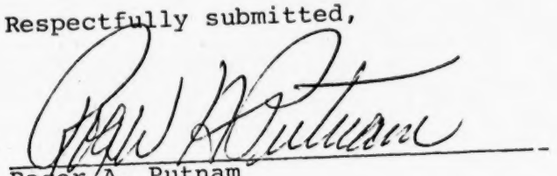
5. A copy of petitioner's summary of argument in the Supreme Judicial Court is attached as an Appendix. The discussion of Hutto v. Finney, 437 U.S. 678 (1978), in the opinion below covered Congress' power under §5 of the Fourteenth Amendment and not the ancillary effect doctrine. 405 A.2d at 239; (Pet. A24).

6. At the time respondents submitted their claim of fees to the Superior Court, the petitioner's financial exposure in the future due to respondents' success on the merits was approximately $40,000 per year. The amount of fees claimed was $5,600; an amount of fees that small seems to cause only an ancillary effect on the state's treasury. Petitioner's arguments about financial disaster (Pet. 8) fall wide of the mark. An award of fees will be ancillary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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December 1979

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